

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 25, 2001

STATE OF TENNESSEE v. GARY M. SEXTON

Appeal from the Criminal Court for Knox County
No. 58014 Ray L. Jenkins, Judge

No. E2000-00167-CCA-R3-CD
November 6, 2001

The defendant, Gary M. Sexton, appeals from the trial court's denial of his Motion for Relief from Judgment declaring him to be a habitual offender pursuant to the Motor Vehicle Habitual Offenders (MVHO) Act. See Tenn. Code Ann. § 55-10-601, et seq. He contends that the judgment is void because the criminal court failed to attach a summons to the leading process as required by Rule 4 of the Rules of Civil Procedure. We hold that the trial court properly dismissed the defendant's motion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JOE G. RILEY and ALAN E. GLENN, JJ., joined.

Mark E. Stephens, District Public Defender, and Paula R. Voss and Robert Edwards, Assistant Public Defenders, for the appellant, Gary M. Sexton.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussmann, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Zane M. Scarlett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 22, 1995, the state filed a petition seeking to declare the defendant a motor vehicle habitual offender. That same day, the trial court issued an order setting a hearing for May 18, 1995, and stating that the defendant had to appear at the hearing and "show cause why he should not be barred from operating a motor vehicle on the highways of this State." On March 28, 1995, the petition and the order were served on the defendant's attorney, who was authorized by the defendant to receive process. The state did not serve a summons with the petition, and neither the petition nor the show cause order stated that the defendant was required to answer the petition and that failure to do so would result in the trial court issuing a default judgment against him. The defendant did not appear at the hearing, and on May 22, 1995, the trial court entered a default judgment, declaring the

defendant to be a habitual offender under the MVHO Act. On June 22, 1999, the defendant filed a motion to set aside the judgment, which the trial court denied on January 20, 2000.

The defendant contends that the default judgment issued against him is void. He asserts that because the MVHO Act is civil in nature, Rule 4, Tenn. R. Civ. P., required that the state serve him with a summons. He argues that because the state failed to serve him with a summons, the trial court did not obtain personal jurisdiction over him. While the state acknowledges that the MVHO Act is governed by the Rules of Civil Procedure, it contends that the Act's requirement of serving the defendant with only a petition and a show cause order take precedence over the summons requirement in Rule 4. Alternatively, the state argues that if a summons was required, the show cause order satisfied the requirement. Finally, the state contends that the defendant did not file his motion to set aside the default judgment "within a reasonable time" as required by Rule 60.02, Tenn. R. Civ. P.

The defendant seeks relief from the judgment pursuant to Rule 60.02, which provides, in pertinent part, "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) the judgment is void The motion shall be made within a reasonable time" The burden of proof is on the one seeking relief from a judgment under Rule 60.02 to show the facts giving rise to the relief. See Holt v. Holt, 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988). Furthermore, a trial court's denial of a motion for relief based on Rule 60 is subject to reversal only upon an abuse of discretion. See Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 97 (Tenn. 1993).

Initially, we note that the defendant inexplicably waited over four years to challenge the default judgment. The state argues on appeal that this four-year delay results in the defendant's motion for relief not being filed within a "reasonable time" as required by Rule 60.02. However, the record does not reflect that the state raised this issue in the trial court or that the defendant had an opportunity to explain the delay if he could. Our supreme court has held that it is a question of fact as to "whether a movant under [Rule] 60.02 has acted within a reasonable time." Wooley v. Gould, 654 S.W.2d 669, 672 (Tenn. 1983). Based upon the record before us, we will not attribute unreasonable delay to the defendant.

Tennessee case law has firmly established that a proceeding under the MVHO Act is civil in nature and governed by the Tennessee Rules of Civil Procedure. See State v. Malady, 952 S.W.2d 440, 444 (Tenn. Crim. App. 1996); Bankston v. State, 815 S.W.2d 213, 216 (Tenn. Crim. App. 1991); Everhart v. State, 563 S.W.2d 795, 797 (Tenn. Crim. App. 1978). Rule 4.01 states, "Upon the filing of the complaint the clerk of the court wherein the complaint is filed shall forthwith issue the required summons and cause it . . . to be delivered for service to any person authorized to serve process. This person shall serve the summons" Rule 4.02 requires that the summons "be directed to the defendant, . . . state the time within which these rules require the defendant to appear and defend, and . . . notify the defendant that in case of his or her failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint." Thus, a summons

should issue in MVHO cases. However, we do not believe that the failure to issue in this case avails the defendant relief.

We conclude that the trial court correctly denied the defendant's Motion for Relief from Judgment because the defendant waived his personal jurisdiction issue when he failed to appear at the MVHO hearing on May 18, 1995. The court's show cause order notified the defendant as to when and where he could defend against the state's petition and indicated that he would lose his driver's license if he did not appear. If the defendant wanted to challenge the trial court's personal jurisdiction over him, he had the opportunity to do so at the hearing. See Tenn. R. Civ. P. 12.02; State v. Strickland, 532 S.W.2d 912, 920 (Tenn. 1975) (defendant must object to sufficiency of service of process before he appears and defends on the merits). However, the defendant chose not to appear at the hearing and defend the case on the merits. Therefore, he waived the personal jurisdiction issue.

In any event, we believe that the language in the court's show cause order essentially satisfies the purposes for a summons in Rule 4.02. According to Rule 4.02, the summons must notify the defendant of when he should appear and defend and that if he fails to do so, a default judgment will be entered against him. The trial court's order informed the defendant that he was to appear on May 18, 1995, at 9:00 a.m., and "show cause why he should not be barred from operating a motor vehicle on the highways of this State." This was sufficient to inform the defendant that he had to appear in court on that date and that failure to do so would result in him losing his driver's license.

Based upon the foregoing and record as a whole, we affirm the trial court's dismissal of the defendant's Motion for Relief from Judgment.

JOSEPH M. TIPTON, JUDGE